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ARTICLE

Reforming judicial recruitment and training in Bosnia-Herzegovina and Serbia under EU guidance: implementation without institutionalisation?

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ABSTRACT

How successful is the EU at institutionalising judicial reforms in accession countries of the Western Balkans? Does its aid and assistance deliver formal compliance and sustainable institutionalisation of new rules and processes? Using a neo-institutionalist approach, we assess the extent to which new EU-supported measures introduced to improve the recruitment and training of judges and public prosecutors in Serbia and Bosnia-Herzegovina are being implemented and institutionalised. We conclude that whilst there is clear evidence of implementation and a widely-held belief in both countries that judicial training and recruitment are improving as a consequence, the institutionalization of new rules and procedures is a far more complex process. It involves continual negotiation between different domestic actors against a backdrop of perpetual threats to undermine new formal rules.

Introduction

In recent years, and especially since the Bulgarian and Austrian presidencies (2018), the EU has striven to re-generate the lost dynamism of the enlargement processes in the Western Balkans. It has placed particular emphasis on the rule of law, which has involved employing a range of tools, including conditionality and monitoring, to assistance and lesson-learning. Reforming judicial recruitment and training systems, plus establishing new judicial institutions such as high councils of the judiciary were key measures that the EU promoted in Central and Eastern Europe during the late 1990s, but with mixed success. The current deterioration of judicial independence in Poland and Hungary, as well as in Bulgaria and Romania, raises questions about the effectiveness of such institutional solutions, the underlying mechanisms of the approach and the durability of the transfer of rules and processes.

Given the importance of the rule of law as a horizontal principle supporting other key democratic institutions, and the EU's so-called 'new enlargement strategy approach' for the Western Balkans, introduced in October 2011,[1] our objective is to explore the conditions under which already initiated reforms lead either to sustainable change in domestic

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institutions, or fail to become institutionalised and therefore have limited or no impact. In terms of our contribution to the literature on reform under the aegis of the EU, we wish to further an understanding of why some aspects of judicial reform take root in candidate and new member states and lead to sustainable improvements in the functioning of the judiciary, and others do not (Mendelski 2012, 2013; Elbasani and Šabić 2018).

We investigate whether the introduction of new rules on training and professional recruitment has led to patchy implementation, imperfect alignment between formal and informal rules, or actual back-sliding in two countries in the Western Balkans: Serbia and Bosnia-Herzegovina (BiH). The two countries represent an example of the region's reform forerunner (Serbia), and a laggard (BiH). The progress of reform in a number of areas in Serbia remains uneven, but is still considerably greater compared to the political and administrative deadlock which BiH has been experiencing for a long time. Tracing the development of new judicial institutions established in both countries with the support and at the behest of the EU, we consider why, following formal implementation, the institutionalisation of new judicial processes continues to pose a challenge.

We start by discussing different explanations for variation in compliance and implementation at the domestic level in countries negotiating accession with the EU, then we introduce our analytical framework. Our focus is the interactions between new, externally introduced rules and existing rules-in-use (Dimitrova 2010; Mungiu-Pippidi 2014). We adopt an actor driven, neo-institutionalist approach that emphasizes the significance of domestic formal and informal veto players and existing formal and informal rules. To understand better the interplay between formal and informal rules, we explore the process of implementation by means of semi-structured interviews and documentary sources. The different assessments of the effectiveness of the reformed institutions indicate that the new formal rules have changed the domestic opportunity structures. Nevertheless, the incomplete or compromised use of the new rules leads to partial effects that do not significantly improve the rule of law. Reflecting on the dynamics of the two cases, we can also add some insights to the growing literature dealing with the interactions between formal and informal rules.

EU rule implementation and reform in the Western Balkans

Scholars have ascribed the slow pace of progress in reform across the region primarily to the weakened or (non-existent) membership perspective for these countries (Kmezić 2017; Preshova, Damjanovski, and Nechev 2017). Others have argued that the external incentives provided by the EU cannot lead to meaningful, large scale reforms without the access, mobilization and cooperation of an active civil society (Fagan 2010; Bobek and Kosaš 2014). More critical analyses of the EU's approach have argued that the Commission has privileged judicial independence above a balancing of power and accountability (Parau 2015). All acknowledge that given the lack of acquis shared by existing EU member states, reforming the rule of law and judicial processes is probably the most difficult aspect of the EU's external governance of (potential) candidate countries in the Western Balkans (Strelkov 2016; Elbasani and Šabić 2018).

We do not contest the importance of membership negotiations, or of civil society involvement. However, we suggest that these factors are secondary and not sufficient to explain progress or stagnation in the institutionalization of imported rules.

Institutionalization – understood here as the alignment of new rules and rules-in-use – is a process which is, in our view, influenced by the competition and bargaining among domestic actors over the shape of the new institutions. After observing external actor supported reforms in Eastern Europe for more than two decades, it is clear that those who contest the new rules or seek to prevent their passage into law, will not simply give up once legislation has been passed. Considering that the political influence and even dominance of actors willing to subvert formal rules for personal gain has, if anything, increased throughout the region, we claim that not only are the domestic constraints in the region more significant than a decade ago, but the domestic context is also in constant flux. So much so, that perpetual re-negotiation, resistance and contention continue to threaten full institutionalisation significantly beyond implementation (Dimitrova 2010).

We depart from an understanding of the existing gap between (new) formal rules and rules in use (Dimitrova 2010; Mungiu-Pippidi 2014; Lauth 2012). In line with much of the contemporary literature on the adoption of EU external rules (Elbasani and Šabić 2018; Dimitrova 2010; Freyburg and Richter 2010), our focus is primarily on domestic actors and their bargaining over the new rules. We aim to contribute to the debate concerning the EU's ability to drive forth rule change in candidate countries via the use of a series of tools and strategies (capacity building assistance and tutelage, conditionality, various knowledge transfer initiatives). The charge against all such mechanisms is that whether used in isolation or in tandem, they fail to deliver significant change quickly enough, or lead to non-substantive and superficial reforms that are subject to post-accession back-sliding (Schimmelfennig 2014).

We explore the conditions under which implementation and institutionalization of specific rules the EU has urged Serbia and Bosnia-Herzegovina to adopt are taking place. Our focus is on two specific institutions: the High Judicial and Prosecutorial Council in BiH and the Judicial Academy in Serbia.[2] Whilst their evolution has been warmly supported and defended by the Commission, neither initiative can be held up as a direct measure of conditionality. What we are exploring therefore is the impact of EU-supported and compliant rules in a particularly contentious and difficult context, where EU compliance requirements are somewhat opaque. The EU does not have a single model of training judges or recruiting prosecutors to 'export' (Mendelski 2013; Parau 2015; Preshova, Damjanovski, and Nechev 2017).

The underpinning rationale for judicial reform in the Western Balkans is that new judicial institutions (councils and academies) will improve practice, a premise not uncontested in the wider literature on judicial reform (Ginsburg 2010; Hayo and Voigt 2007). The most optimistic conclusion of this literature so far is that *de jure* guarantees are the *most significant determinants of independence* on the benches. Although cross-national comparative studies illustrate that countries observing human rights protection are invariably those with *de jure* independence built into constitutions and legal frameworks (Keith 2002; Hayo and Voigt 2007), studies of post-socialist countries have found no direct relationship between *de jure* and *de facto* independence (Smithey and Ishiyama 2002). Even in countries where rules and practice appear to coalesce, the critical issue is sequencing: *de jure* independence is shown to lag behind *de facto* independence (Melton and Ginsburg 2014, 188–9).

Whilst this is not to suggest that EU measures to support *de jure* change in Serbia and BiH will fail to deliver de facto independence or at least better practice, this is by no means certain based on existing studies.

We build on Dimitrova's (2010) approach, which defines the EU's recommendations as 'imported rules' that have to first be formally implemented and then institutionalised. Our focus is on the latter stage of implementation whereby domestic actors bargain (again) over the shape of the new rules in practice. Based on the existing literature, we anticipate that resistance to the implementation and institutionalization of the two new bodies will occur, and will come from actors (veto players) who would prefer to restrict access to the judiciary as an important state institution affecting their possibility to engage in rent seeking (North, Wallis, and Weingast 2009). We expect that the new rules will either be institutionalized, partially implemented or subverted. We identify these outcomes starting from Dimitrova's (2010) approach outlining three broad scenarios with regard to the institutionalization of adopted rules: (i) formal new rules align with practice; (ii) new rules are ignored (decoupling or 'empty shells'); or (iii) new rules are openly reversed. Other recent studies from the EU's Eastern neighbourhood have found that under certain circumstances EU promoted rules can be (iv) deliberately subverted so as to strengthen authoritarian regimes and institutions, leading to 'illiberal regime reinforcement' (Börzel 2015; Börzel and Hüllen 2014). In such cases, the rules may well formally remain in place and are not reversed, but are (mis)-used to reinforce 'old' practices. Other analyses have identified the possibility of (v) 'partial compliance' (Noutcheva 2009).

Taking these scenarios of rule institutionalization on board, we add *rule subversion* and *partial compliance* (with EU requirements) to the range of potential outcomes. We expect partial compliance to be a likely outcome, given the lengthiness of negotiations between Brussels and the Western Balkans candidate countries and the absence of accession pressure. We also consider the possibility of reversal to be affected by the credibility of conditionality linked to the promise of accession (Schimmelfennig and Sedelmeier 2005; Steunenberg and Dimitrova 2007). Analyses of reversal of EU supported rules post accession in Central and Eastern European member states support this expectation (Meyer-Sahling 2011).

Our two case-study countries are embedded in different contexts of enlargement negotiations: Serbia is progressing with negotiations and is therefore in a period where conditionality is quite effective. Bosnia's membership perspective, on the other hand, is more symbolical than a reality, due largely to the negligible or non-existent pace of reforms; reversal is therefore a distinct possibility. In the case of Serbia, we expect reversal to be most likely or possible after (rather than prior to) accession. In the case of Bosnia-Herzegovina, we expect all outcomes to be possible, as the time horizon for potential candidates is very long and thus the credibility of EU conditionality (in terms of threats *and promises*) is lower than in Serbia. We expect, therefore, that decoupling (implementing different informal rules from the formal ones), and partial implementation or subversion would be the most likely outcomes for our two case-study countries.

Whilst we fully acknowledge that the successful implementation of new EU-inspired rules and institutions does not on its own guarantee improvements in the quality of judicial practice (Parau 2012, 2015; Kmezić 2017), it is still important to establish whether new, EU promoted rules become part of existing sets of judicial rules or not. We see the

institutionalization of adopted rules as a critical step in improving the functioning and quality of the judicial system. Our focus is, therefore, on further exploring the conditions under which new sets of rules or recommendations are leading to domestic institutional change.

Method and approach

This is a comparative study using a most different systems design to explore and identify factors influencing similar outcomes in two different country cases. As noted, our case selection is influenced by the differences in reform progress vis-à-vis the accession process on the one hand, and similarity in terms of EU pressure to undertake fundamental reforms with regard to the rule of law on the other. Both countries have embarked upon bold institutional reforms appertaining to the training and selection of judges. The results – lack of institutionalization of rules in the two relevant areas – are also similar. The process tracing approach that we apply aims to gain further insights on why formal and informal rules do not align into functioning institutions.

We gathered the bulk of our data from fifteen semi-structured interviews with legal actors and professionals within the state and non-state sectors in both countries, as well as with international organisations working in the region to promote rule of law reform. The majority of the interviews were carried out during February 2015, with a further round of interviews in 2017 to update and clarify the gathered data.

Serbia, the EU and judicial reform

Serbia has undertaken a remarkable Europeanization journey, from a post-authoritarian country blamed for the Yugoslav conflicts of the 1990s, intransigent in apprehending and extraditing high-profile war-crimes suspects, to the most recent country to commence EU accession negotiations (in January 2014). At the time of writing (mid-2018), chapters 23 and 24 are open and a track record of positive change in terms of tackling corruption and reforming the judicial process is, according to the EU's own assessment, beginning to emerge (European Commission 2016b).

Using a variety of instruments and strategies (IPA, TAIEX, Twinning), the EU has invested heavily in reforming the Serbian judiciary and building new institutions in an attempt to change practice on the benches. Thus, although the Commission's focus on judicial reform in Serbia pre-dates the new approach, opening negotiations and the emphasis on chapters 23 and 24 have intensified the external pressure since 2011. The following section will consider the evolution and performance of the Judicial Academy, an initiative supported by the EU.

The judicial academy in Serbia: effective training, but political interference by other means?

As is the case in other post-socialist states, the core issue in reforming judicial independence in Serbia has been the understanding and application of the concept of 'independence' amongst judicial practitioners and political actors in general. During the Yugoslav period, any notion of independence was meaningless insofar

as the judicial profession was an institution of the one-party state (Herron and Randazzo 2003). Across post-communist Eastern Europe reform efforts have, with varying degrees of success, sought to separate judges from politicians as well as improving the effectiveness of the judicial process and the training of judges. However, reforms have also made parts of the judiciary, especially general prosecutors, too independent and therefore unaccountable (Bobek and Kosaš 2014; Elbasani and Šabić 2018; Parau 2015).

Ensuring that judges are well trained, qualified and appointed according to merit, can go a long way to improving the judicial system. Two important challenges for Serbian reforms are: (i) ensuring meritocratic entry into the profession; and (ii) providing appropriate and comprehensive training for existing judges. With regard to the latter, one difficulty relates to the fact that in Serbia, 'law is usually taught by professors who have never practiced it' (Kmezić 2017, 114). This, according to Kmezić, reinforces an existing gap between 'mechanical jurisprudence' (simply applying previous rulings) and 'sociological jurisprudence' (a more philosophical approach based on the social effects of legal institutions, doctrines, and practices) that makes 'harmonization with the acquis and the application of…EU law…and unprecedented challenge' (2017, 114).

To improve the qualifications of current and new judicial practitioners, and to ensure meritocratic entry and progression within the profession, the EU and other international actors recommended creating 'The National Judicial Academy of the Republic of Serbia'. The objective of this new training institution was to improve the performance and legitimacy of the courts and to reform practice 'on the benches'. The process began in 2009 with a two-year EU-funded project to create a 'standardised System for Judiciary Education and Training'. The aim was to upgrade the existing Judicial Centre for Training and Professional Development – established in 2001 by the Judges' Association of Serbia (JAS) – as a nationwide, independent professional association[3] – into a national Judicial Academy for initial and continuing training for judicial practitioners.[4] The Judicial Centre was essentially a bottom-up initiative that in its 8 years of existence had provided judges with resources for continual professional development. By 2009 its training provision had been accessed by over 25,000 judges and legal practitioners.

The EU's support for the new Judicial Academy was based on the assertion that the existing training centre had failed to improve the quality of the judiciary – both in terms of process efficiency and the quality of decisions.[5] A key constraint for the Training Centre was that it operated, *sui generis*, entirely outside of the legal framework, and functioned as a professional organisation with semi-public status 'under the patronage of the Supreme Court' but with no ascribed legal function or status (Kmezić 2017, 115). Another reason for replacing it, cited by critics, was that it had failed to implement entry training and establish permanent training for sitting judges.[6]

The process of upgrading the Training Centre into a national Academy has relied heavily on EU assistance and support. Amongst certain judges and lawyers in the country, the Academy is a positive example of internationally assisted judicial reform, actively involving civil society in its trainings, with the potential to become a forum where judges can openly discuss political interference and threats to their independence.[7] The EU has heavily promoted the Academy as a tool for improving the quality of the judiciary. It has also insisted in its annual Progress Reports that '[t]he means and expertise of the Judicial Academy should be increased and the legislative

and institutional framework adapted to allow it to become the compulsory point of entry to the judicial profession' (European Commission 2013b, 9–10).

Compared to its predecessor, the Judicial Academy does provide far more comprehensive initial and continuous training. There is, for the first time, a clear and rigorous process of selection and entry training for magistrates and trainee judges that is transparent and based on both a written and oral exam, plus a personality test.[8] The curriculum provides for tutelage in international legal standards as well as a strong practical element. Admitted candidates undertake a placement as part of their training and are closely supervised by a designated mentor throughout the 18 months of training. Continuous training for existing judges remains voluntary, but there are clear guidelines governing the circumstances under which the Hugh Judicial Council may refer a sitting judge for training. Although the Judicial Academy is still not formally part of the education system, it is now more firmly anchored within the judicial system than its predecessor. In his evaluation of the Academy's performance thus far, Kmezić makes the following observation: 'Until recently it has been unthinkable for a judge to make a reference to the European Court for Human Rights in his or her judgement. Today, not only is this practice common, but the decisions made by the European Court for Human Rights are even considered by the Supreme Court for the creation of legal practices' (2017, 118). As of mid-2017, the Academy had processed just under 10,000 participants through its training programmes, with over 300 courses taking place each year across the country.[9]

The adoption of the Law on the Judicial Academy in 2009 established its responsibility for initial training of future judges and prosecutors as well as continuous training for sitting judges, prosecutors, and court assistants (National Assembly of the Republic of Serbia 2009). According to the new law, graduates of initial training were guaranteed immediate employment and the support of the High Judicial Council (responsible for nomination) to obtain permanent tenure in front of other candidates. This would have quickly and decisively established the new Academy as gate-keeper to the profession and established, within a generation, minimum standards of training and adherence to a universal curriculum. In terms of implementation and institutionalisation, all appeared to be on track – the new Academy was set to become the new 'rules in use' and, to use the language of our analytical framework, *formal new rules were aligning with informal rules.*

However, the preferential selection of graduates of the Academy, a key element in terms of merit based selection for the judiciary, has been contested. The selection mechanism was referred to the Serbian Constitutional Court by a group of judges and prosecutors who objected to the new entry requirements and the requirement for continual training.[10] The Court declared the initial provisions of the Law on Judicial Academy to be unconstitutional. As a result, graduates of the Academy could no longer be treated preferentially, nor could new or existing judges or prosecutors be compelled to undertake the Academy's trainings. This was a major setback for the Academy in becoming a fully-fledged national training authority and the source of merit based appointments for the judiciary as a whole. To use the language of our analytical framework, it represented *new rules (being) openly reversed*. The cause of the reversal is clearly bargaining over the shape and scope of the new rules by among formal (the Constitutional Court) and informal veto players (the group of judges and prosecutors).

Further investigation suggests that the rules governing the Academy's place in the judicial system clash or contradict other sets of existing formal rules Whilst the legal framework within which the Academy works is more comprehensive and robust than that which governed the Training Centre, its role and function within the judicial system is not precise enough for many.[11] For example, the 2006 constitution created two separate bodies (the High Judicial Council and High Prosecutorial Council) for the recruitment and career management of judges and prosecutors. The relationship between the Academy and these two bodies is not clearly stipulated and, according to the European Commission, 'further legislative and institutional changes are needed…' (European Commission 2013b). Drawing on the language of our framework, this suggests *partial compliance*. The source of partial compliance appears to be an incompatibility between existing sets of rules, rather than the actions of informal and formal veto players as in the previous instance discussed above. The meteoric rise of the Academy and the changes regarding the appointment of judges and prosecutors had an additional effect of dividing the judicial community (between candidates with experience, and graduates of the Academy) and, according to its critics, brought additional confusion into a judicial system that lacks public credibility.[12]

Whilst it might well be that the Constitutional Court ruling is evidence of *new rules (being) openly reversed* in an attempt by those associated with the prosecution to keep control over entry into the profession, concerns about the divisiveness of the new institution are legitimate. Full institutionalisation, based on our conceptualisation, occurs when *informal rules fully aligning with formal rules, and new institutions (become) paramount and able to realise their designated jurisdiction and authority*. If there exists a duplication of rules, this creates institutions with contested authority, and full institutionalisation cannot be said to have taken place.

Despite the Constitutional Court ruling, the EU has remained steadfast in its support for the Academy. Indeed, the 2016 progress report reiterates that whilst ensuring compliance with the ruling '(f)urther reform of the Academy is needed to improve its professional, financial and administrative capacity so it can become a proper independent and compulsory point of entry to the judicial profession' (European Commission 2016b, 14). The Commission's statement resonates with concerns raised by the (non-governmental) Association of Prosecutors, which argues that the Academy remains a weak institution lacking sufficient independence and being subject to undue political interference.[13] It is argued by those supporting voices in the profession that if the Academy is to properly drive up standards and increase the efficiency and professionalism of the judiciary, further reforms are needed to bolster its power vis-à-vis the executive, to increase its capacity as a training and professional standards body, and also to better integrate it within the judicial system (in particular, to foster closer link with the High Judicial Council).[14] This would also strengthen the prospect of full institutionalisation whereby *new rules align with practice*.

Whether the Judicial Academy is sufficiently independent or not, other political actors continue trying to influence its processes and composition. Of particular concern is the fact that the Ministry of Justice currently wields considerable influence over the composition of the Academy: three out of nine members of the Managing Board are appointed directly by the government, including one official from the Ministry of Justice; the Ministry is also responsible for monitoring the Academy's overall performance. Thus,

representatives of the executive exercise more than just oversight. They are in fact involved in the management of the Judicial Academy, with potentially negative consequences for the independence of individuals entering the profession. The Serbian Anti-Corruption-Council, a governmental advisory body established in 2001, commented: 'this way of selecting new attendees of the Judicial Academy is a model by which the executive power acquires the possibility to participate in the selection of new judges and prosecutors through the Judicial Academy' (Anti-Corruption Council 2014, 10).

Concluding this overview of the introduction of one element supporting judicial professionalism and independence, we note that there is a widely-held consensus amongst key stakeholders that an acceptable balance between independence, accountability and professional competence has yet to be struck in Serbia.[15] The limited and contested efficacy of the Academy compounds a judicial system that is slated for the persistence of politically appointed judges, for poor quality prosecutors in basic courts, and for the lack of expertise on issues relating to EU and other international legislation.[16]

For critics, EU assistance and support has transformed the existing Training Centre, which had been established by domestic practitioners and operated independently of political interference from the executive and legislature, into an Academy that (formally) allows significant involvement of the Ministry of Justice in the training of judges and prosecutors, and enables three out of nine members of the Managing Board of the Academy to be appointed directly by the government (National Assembly of the Republic of Serbia 2009). Of greater concern is that the new body, implemented with the support and backing of the EU, has in practice limited authority to control entry and exit to the profession and drive forth raised standards via comprehensive training. Thus, rather than the *new rules aligning with practice*, there is clear evidence of those new rules being *partially reversed*.

Building judicial independence in Bosnia and Herzegovina

Supporting the dual projects of peace-building and institution-building in ethno-territorially fragmented BiH represents the most ambitious initiative by the EU in the Stabilisation and Association process spanning the Western Balkans. As a result of the post-conflict settlements after the wars in the 1990s, central state functions are generally weak, and most substantive political power rests with the two sub-state entities: the Federation of BiH (FBiH) with a Bosniak majority and Croat minority; and the Serb-dominated Republika Srpska (RS). In FBiH, there are also ten cantons (most with recognised ethnic majorities), which compounds the problems of administrative and political fragmentation. Brčko District is disputed by RS and FBiH, and is governed as a condominium between the two entities with an international administration.

This complex constitutional configuration has allowed ethnic elites to exert unchecked authority in all aspects of political, economic, judicial and social life. The international community has provided substantial financial and technical assistance for nearly two decades, first under the auspices of the Dayton-Paris Agreement at the end of the wars, and then the Stabilisation and Association process from 2000. This evolution of external incentives and change of key actors involved has been described as a pathway from 'Dayton' to 'Brussels' as the driver of change (Aybet and Bieber 2011). Notwithstanding the claims that external interventions are tantamount to a 'European

Raj' (Knaus and Martin 2003), international assistance, particularly from the EU, has been pivotal in reforming judicial institutions across the country.

BiH has long been viewed as a laggard in terms of EU accession, and has experienced huge difficulties and lengthy delays in negotiating an SAA (Stabilization and Association Agreement). In terms of reforming the rule of law, the peculiar constitutional configuration of the country institutionalises fragmentation of the judiciary and prevents the pursuit of common standards and practices (Kadribašić 2014). The challenge is to ensure that the country's citizens are treated equally regardless of the entity or canton in which they reside, but also to prevent a multitude of political actors from interfering within a constitutional architecture that potentially provides a plethora of opportunities to do so.

The high judicial and prosecutorial council (HJPC) of BiH

The state-level HJPC of BiH was established through a voluntary Transfer of Certain Entities' Responsibilities Agreement signed by the Prime Ministers of the Federation and RS and the Minister for Justice of BiH in 2004. The HJPC is not identified within the constitution, but justifies its existence through constitutional principles and owes its existence to pressure from the international community to ensure state-wide powers and a harmonization of standards and competences (Venice Commission 2014, 3). Its existence as a state-wide body created 'to consolidate and strengthen the independence of the judiciary' is immediately salient and, of course, highly controversial in such a fragmented political and constitutional system (Kmezić 2017, 68). Indeed, the full institutionalisation of the HJPC – understood here as *old rules fully aligning with new rules*, and the new institution being able to realise its designated jurisdiction and authority – would symbolise progress towards Europeanization, de-ethnification, and political and constitutional change.

Notwithstanding certain teething problems in its first year, most judges and experts interviewed for this research were positive about the HJPC and credited it with having improved performance and independence of the judiciary.[17] It is widely seen as the most successful institutional innovation for transposition of EU standards in the area of rule of law (Kmezić 2017, 69). Indeed, in its most recent progress report, the Commission describes the HJPC as 'the key institution managing the judiciary throughout the country' (European Commission 2016a, 14).

As noted above, the HJPC is one of the very few independent state-level bodies in existence.[18] It has wide-ranging competences across courts and prosecutors' offices across all levels of governance in BiH, including: appointment and promotion of all judges and prosecutors in BiH; receiving complaints and conducting disciplinary proceedings; determining training; and proposing judicial budgets.[19] The current composition of 15 members of the HJPC comprises judges and prosecutors from the state, entity, and district levels appointed by members of the respective courts and prosecutor's offices. The only indirect influence exerted by the other branches of authority is through the selection of the two non-judicial/non-political members of the HJPC by the Parliamentary Assembly of BiH and Council of Ministers of BiH, respectively.[20]

In its 2012 assessment of judicial independence in BiH, the Venice Commission concluded: 'the establishment of the HJPC and its performance over the eight years of its existence have been assessed positively by representatives of the judiciary in BiH. The

HJPC ha(s) helped increase the institutional and individual independence of the judiciary' (Venice Commission 2012). A recent TAIEX[21] seminar concluded that the HJPC has been given greater competences than similar bodies in EU member states and other parts of the Western Balkans, and is seen to be completely independent of executive and legislative control (European Commission Services 2015, 8).

Perhaps due to its perceived independence, the HJPC has been frequently targeted publicly by political leaders, mainly but not exclusively from Republika Srpska. In late 2012, leaders from both the SNSD (the Alliance of Independent Social Democrats – RS) and the SDP (Social Democratic Party – FBIH) signed an agreement that proposed to make the appointment of chief prosecutors a decision of the legislature. Although this was justified as a necessary measure to ensure greater checks on judicial power, the change would have weakened the independence of the HJPC and opened the door to more political interference. The agreement was immediately criticised by the President of the HJPC, the Venice Commission (in its 2012 Opinion), and EU officials and no change was made to the process for appointing chief prosecutors (Tausan and Dzidic 2012). To use the language of our analytical framework, despite an overt attempt *to reverse the new rules*, this was averted and the HJPC's authority and power was maintained.

Despite the positive assessments of the HJPC and its apparent ability to forestall overt attempts to diminish its powers and authority by political elites, concerns have been raised about two aspects of its work: the effects of its independence, and the meritocratic appointment and promotion of judges and prosecutors. Regarding independence, the allegation is that ethnic interests or factions *within* the Council have begun to impede its work.[22] This is difficult to corroborate due to the fact that the HJPC works entirely behind closed doors, but concerns have been raised that members of the HJPC are bringing their ethno-political agenda into the proceedings.[23] With regard to meritocratic appointment, the concern is that due to the requirement for constituent peoples to be represented within the selection process, the qualifications of judges and prosecutors are not always paramount criteria (Kmezić 2017, 70).

To its critics, the HJPC has been effective in guarding its authority, but less prudent in limiting contact with political actors or bodies, and is not using its independence to promote a judiciary free of political influence.[24] The internal workings of the Council – how various factions are balanced and managed – are as critical to ensuring independence as the prevention of (direct) interference from the executive, legislature or other political interests. In other words, greater independence does not necessarily equal fairer and more equitable decisions. Independent bodies, as the comparative literature suggests, can be as conservative or subjective as judicial bodies that are heavily influenced by political elites (Garoupa and Ginsburg 2008).

Following discussions in the Structured Dialogue on Justice between the EU and BiH,[25] the HJPC adopted a rulebook on conflict of interest in May 2014, seen as a first step towards an ethical code for the Bosnian judiciary. However, soon after its adoption, some members of the HJPC suggested amending the rulebook, an amendment which would water down the provisions, which the Commission felt would result in 'a vacuum on questionable practices of conflict between private and public interest of its members'. Furthermore, in November 2014, the HJPC discussed revoking the rulebook altogether (European Commission Services 2015, 2). The provision that caused particular consternation was the stipulation that members of the HJPC

would have to resign if their parents, children, adoptive parents, adopted children, spouse, or common law partner applied for any post in the judiciary.[26] In response to the HJPC attempts to amend the rulebook, the EU organised a TAIEX seminar on 'Conflict of Interest in the Judiciary' at the EU Delegation in Sarajevo in February 2015. The EU and member state representatives stressed that in return for the 'unprecedented' level of HJPC independence, necessary in the highly politicised Bosnian context, it was vital to maintain 'clear and stringent' measures related to conflict of interest (European Commission Services 2015, 8). The HJPC conceded and withdrew the proposal to amend the code of practice.

The EU intervened quickly and decisively as it believed the functioning of a judicial institution it has supported was threatened, but also because it was concerned that the new institution was not performing in accordance with its remit. As an official at EUSR observed, there was a sense that with the high levels of independence enjoyed by the HJPC, its members were 'out of control' and felt 'untouchable', and there was the danger that the HJPC would slide towards 'judicial oligarchy' as in Croatia.[27] The same official also noted that the issue was not about ensuring greater control or accountability for the executive or legislature, but 'ensuring mechanisms for regulating the HJPC'.

In its 2014 progress report, the Commission noted that 'a lack of adequate disciplinary sanctions against wrongdoing judicial office holders' (European Commission 2014b, 13). The responsible institution, the Disciplinary Prosecutor, has received extensive support from the EU, but its institutional location within the HJPC has undermined its effectiveness and conjured a sense that it is not properly independent. EU and other international officials recognise that the Disciplinary Prosecutor 'should not have to report to the members of the HJPC on his/her colleagues (i.e. other members of the HJPC)'.[28] For example, an EUSR official cited the case of a judge who had not cast a verdict in a number of years, leading to the statute of limitation expiring in a number of cases. The Disciplinary Prosecutor recommended removal, but the HJPC, which has the final say, overturned the recommendation.[29] The problem is that 'everybody knows everyone here. So they tend to be protective… there are no sanctions… They never fully dismiss you, you are guaranteed your pension, so nobody is afraid of doing anything that is unethical or unprofessional, because there are no repercussions'.[30] Thus, the HJPC is able to continue in this way because of the lack of transparency and a 'very high level of independence'.[31] In its most recent progress report, the EU's concerns about the balance between accountability and power of the HJPC are clearly stated: 'The constitutional and legal framework needs to ensure full protection against unlawful pressure on the independence, impartiality and autonomy of judges and prosecutors. There is a need to broaden the grounds for appeal against final HJPC decisions including those on appointments of judges and prosecutors and their transfers as well as in disciplinary proceedings'.

In terms of our analytical framework for investigating how new rules fare after formal implementation, the case of the HJPC illustrates the resilience of EU-backed rules in the face of attempts to subvert and nullify. Critically, the case study shows that attempts to subvert can occur from *within* the new organizational framework, and the process of institutionalising a new body may involve repeated interventions

(from the EU and other external actors) to continually ensure that *new rules align with other rules and are not reversed*. Given that the preference of some domestic actors was for subverting or reversing the new rules, the EU intervention should be understood as the external actors participating in the domestic bargaining over the shape of the new rules. It is worth noting that such repeated interventions may only be possible when both the formal role and the power of external actors vis-à-vis domestic actors are significant.

Conclusion

Our objective has been to extend understanding of the conditions under which already initiated reforms based on externally imported rules lead to sustainable change in domestic institutions, or alternatively fail to become institutionalised and therefore have limited or no impact. Drawing on existing theoretical studies, our analytical framework identified five possible pathways for the interaction between formal and informa rules post adoption: (i) full alignment; (ii) new rules are ignored; (iii) new rules are openly reversed; (iv) new rules are subverted; and (v) partial compliance with new rules.

In both case-studies, new formal rules promoted by the EU are in place. The Venice Commission and the EU agree that notwithstanding certain deficiencies and shortcomings, both Serbia's Academy and BiH's High Council have made a positive contribution to judicial recruitment and training. However, our data suggest that full institutionalization has not occurred in either case. Indeed, we found evidence of *attempted* subversion and reversal, involving a new round of competition about the form of the new rules. Analysing the stages of rule development in both institutional settings, we attribute such lack of institutionalization not simply to rejection or reversal, but to *partial* subversion and *partial* institutionalization. This halfway state is the result of at least two sets of factors: first, the interventions and bargaining of domestic actors that find themselves constrained by the new rules, and second, lack of fit with other existing formal and informal rules. In the case of Serbia, other formal rules create different frameworks for judicial recruitment and undermine institutionalization. In the case of BiH, there is a continuing discrepancy between formal and informal rules, leaving the new rules subject to being contested and defended but not yet institutionalized in terms of changing the behaviour of the members of the High Council.

Beyond our country specific conclusions, it is also possible to identify the broader implications of these cases for future research. Regarding the transformative power of the EU, our findings endorse the assertion that institutionalisation after formal implementation is particularly complex. We illustrate not just the ease with which subversion and reversal can occur, and the vulnerability of new rules to 'legacies of deep conditions' (Cirtautas and Schimmelfennig 2010, 431), but the extent to which the success of even an apparently successful reform is contingent upon a continual process of bargaining among veto players and prone to interventions by external and internal stakeholders competing to influence the shape of the new rules.

Notes

1. Under the new approach chapters dealing with rule of law and fundamental rights are not only prioritised at the start of accession negotiations, but also remain open throughout the negotiation process (European Commission 2011, 5).
2. Whilst both the judicial academy and the HJPC have been the focus of conditionality and the target of assistance and training initiatives, it is important to note that at no point has the EU insisted or directly requested that Serbia or BiH create such bodies.
3. Interview with JAS, Belgrade, 26 February 2015.
4. The EU's IPA 2012 programme contained a fiche entitled 'Support to the Rule of Law System', which included activities related to building curricula at the Judicial Academy.
5. Interview with Judges' Association (JAS), Belgrade, 26 February 2015.
6. (Venice Commission 2014, 8–9).
7. Interview with Yucom, Skopje, 27 August 2014.
8. For details, see: http://www.vk.sud.rs/sr-lat/o-pravosudnoj-akademiji. Also, interview with JAS, 26 February 2015.
9. Interviews with the Judicial Academy, Belgrade, 2 March 2017.
10. Interview with Association of Prosecutors, Belgrade, 24 February 2015.
11. Interviews with: Centre for Human Rights, Belgrade, 24 February 2015.
12. Interview with Association of Prosecutors, Belgrade, 24 February 2015.
13. Ibid.
14. Ibid.
15. Interviews with: Centre for Human Rights, Belgrade, 24 February 2015; Judicial Academy, Belgrade, 23 February 2015; JAS, Belgrade, 26 February 2015; SEIO, Belgrade, 24 February 2015; Association of Prosecutors, Belgrade, 23 February 2015; Ministry of Justice, Belgrade, 26 February 2015; and the EU delegation office, Belgrade, 27 February 2015.
16. Interviews with: the Judicial Academy, Belgrade, 23 February 2015; JAS, Belgrade, 26 February 2015; SEIO, Belgrade, 24 February 2015; Association of Prosecutors, Belgrade, 23 February 2015; BIRODI, Belgrade, 27 February 2015; and the Centre for Human Rights, 24 February 2015.
17. Interviews with 4 judges (conducted in May / June 2014).
18. Law on HJPC, Consolidated text, art. 1. The HJPC provided a copy of this document.
19. Law on HJPC, art. 17.
20. Law on HJPC, art. 4.
21. TAIEX: Technical Assistance and Information Exchange Instrument of the European Commission. See: https://ec.europa.eu/neighbourhood-enlargement/tenders/taiex_en.
22. Interview with an international official working in Sarajevo, 20 February 2015.
23. Ibid.
24. Indeed, politicians from across the political divide have suggested an increase in the executive and legislative influence in appointing HJPC members.
25. "The Structured Dialogue on Justice is a mechanism of the European Commission to advance structured relations on the rule of law with potential candidate countries. The Structured Dialogue assists Bosnia and Herzegovina to consolidate an independent, effective, efficient and professional judicial system. The first meeting of the EU-BiH Structured Dialogue on Justice was held on 6 and 7 June 2011. See: http://europa.ba/?page_id=553.
26. Book of Rules on Conflicts of Interest for Members of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina, adopted 29 May 2014, art. 2–4. Copy provided by the HJPC.
27. Interview with an EUSR official, 9 February 2015.
28. Interview with an international official working in Sarajevo, 20 February 2015.
29. Interview with an EUSR official, 9 February 2015.
30. Interview with an international official working in Sarajevo, 20 February 2015.
31. Interview with an EUSR official, 9 February 2015.

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